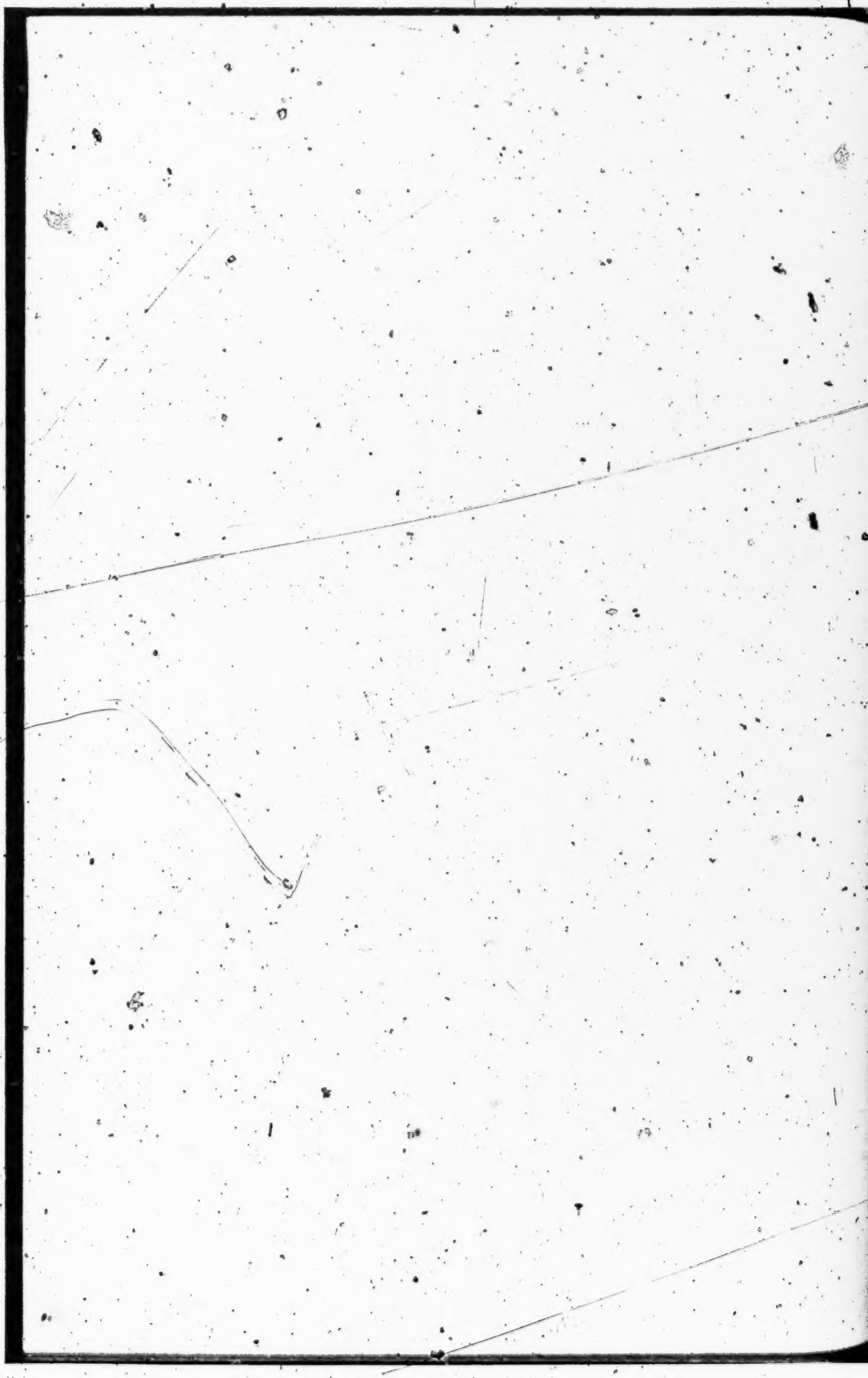

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 972

RAYMOND J. FUNKHOUSER AND ELMER N. FUNKHOUSER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF R. J. FUNKHOUSER & COMPANY, APPELLANTS.

vs.

J. B. PRESTON COMPANY, INC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OF BASIS ON WHICH APPELLANTS CONTEND THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE JUDGMENT APPEALED FROM, AS REQUIRED BY UNITED STATES SUPREME COURT RULE 12.

Pursuant to United States Supreme Court Rule 12, Paragraph 1, the defendants-appellants file this their

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statement showing the basis on which they contend that the United States Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein as follows:

(*a*) The Federal statutory provisions sustaining the jurisdiction of this Court in the above entitled action is Section 344 of the United States Code Annotated (Judicial Code, 237 amended), reading as follows:

> "A final judgment or decree in any suit in the highest court of the State in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court upon writ of error."
>
> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal." (Judicial Code, Section 861*a*.)

(*b*) The statute of the State of New York, the validity of which is involved herein, reads as follows:

> "Interest to be Included in Recovery.—Where *in any action* final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the *total amount* awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the *total amount*

awarded, and included in the amount of the judgment. *In every action now pending or hereafter brought wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, other than a contract to marry, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded.*" (New York Civil Practice Act, Section 480 as amended by Chapter 623 of the Laws of 1927, in effect April 4, 1927.)- (Italicized portions indicate the amendment in effect April 4, 1927.)

(*c*) The date of the judgment sought to be reviewed herein is March 6, 1933. The date upon which the application for the allowance of an appeal herein was presented is March 21, 1933.

(*d*) Statement under Rule 12 showing that the nature of the case and of the rulings of the Court of Appeals of the State of New York were such as to bring the present action within the jurisdictional provision relied on herein, as above stated, and the above citation of cases believed to sustain such jurisdiction are herein set forth.

Prior to the enactment of the amendment of April 4, 1927, Section 480 of the Civil Practice Act of the State of New York read as follows:

"Interest on Sum Awarded to Be Included in Recovery.—Where final judgment is rendered for a sum of money awarded by a verdict, re-

port or decision, interest upon the sum awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the sum awarded, and included in the amount of the judgment." (Chapter 925 of the New York Laws of 1920 in effect April 15, 1921.)

The case is one in which the validity of the amendment of April 4, 1927, to Section 480 of the New York Civil Practice Act is drawn in question, upon the ground that said amendment is repugnant to the United States Constitution, Article I, Section 10, and to the 14th Amendment thereto, as impairing the rights and obligations of the defendants-appellants-respondents herein and as depriving them of their property without due process of law.

The final decision of the Court of Appeals of the State of New York is the court of last resort in all causes in the State of New York in which a decision could be had, and the decision of said court in this cause was in favor of the validity of said amendment in so far as the same affects actions upon a contract entered into prior to said amendment.

Therefore, in accordance with the rules of the Supreme Court of the United States (Rule 46, Paragraph 2), the defendants-appellants-respondents herein respectfully show this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Statutes at Large 54), was passed, to wit, under Section 237 (*a*) of the Judicial Code (28 U. S. C. A. Section 344), a review could be had in the

Supreme Court of the United States on writ of error as a matter of right.

For the purpose of showing that the nature of the case at bar and of the ruling of the Court of Appeals of the State of New York herein was such as to bring the present action within the jurisdictional provision relied on herein, as stated above, defendants-appellants-respondents herewith submit the following statement bearing thereon, together with the citation of cases believed to sustain the jurisdiction of this Court in the premises.

The instant case originated upon the service of a summons and complaint in the Supreme Court of the State of New York, County of New York, praying for a judgment against the defendants-appellants-respondents for their alleged breach of contract dated the 25th day of January, 1923, between the plaintiff and the defendants.

Said action was tried at a Trial Term of said Supreme Court of the State of New York on and between the 7th day of April, 1930, and the 5th day of May, 1930, and a verdict was rendered therein by direction of the court in favor of the plaintiff in the sum of $45,889.70 with interest amounting to the sum of $14,417.57, making a total of $60,307.27. The Trial Court awarded damages to the plaintiff in the sum of $45,889.70 which was based upon the difference between the contract price and the plaintiff's cost of production.

Prior to the enactment of the amendment, in effect April 4, 1927, of Section 480 of the New York Civil

Practice Act, the damages, such as were awarded in the present case, were held to be unliquidated damages and no interest was recoverable thereon. *Gray* v. *Central Railroad Company of New Jersey*, 157 N. Y. 483, 485; *Faber* v. *City of New York*, 222 N. Y. 255. It therefore clearly appears that there was a question as to the validity of said Section 480 of the New York Civil Practice Act as amended April 4, 1927, in so far as said Act affected actions for unliquidated damages upon contracts entered into before April 4, 1927.

Said defendants-appellants duly appealed to the Appellate Division of the Supreme Court of the State of New York, First Department, and upon said appeal to said Appellate Division the validity of said Section 480 of the New York Civil Practice Act as amended was called to the attention of said court, and it was urged that said section as so amended was repugnant to the United States Constitution, Article I, Section 10, and the Fourteenth Amendment thereto.

Said Appellate Division in its decision herein, reported in 235 Appellate Division 200, stated:

> "There is another important question involved which requires our consideration. Interest was allowed on unliquidated damages. That this claim was clearly unliquidated appears to be beyond question. Prior to 1927, interest could not be recovered on such a claim. During the year 1927, a statute was enacted allowing interest on all unliquidated claims. The question arises, however, whether interest may be allowed on such a claim which arose prior to the enactment of that statute.

This question has been the subject of an opinion in the Court of Appeals in so far as it applies to the State of New York (*Sweeney* v. *The State of New York*, 251 N. Y. 417). In that case the court did not decide, however, whether such a statute could be enforced against a defendant other than the State of New York. When the matter was before the Appellate Division, Fourth Department (225 App. Div. 606), that court held that the portion of the statute which made it compulsory to allow interest on unliquidated claims was not retroactive and did not apply to a claim such as is now before this court. In a Per Curiam opinion, the court said:

'The matter of interest allowed involved a substantial right and not merely a question of procedure. Statutes are presumptively applicable *in futuro* only. (*Jacobus* v. *Colgate*, 217 N. Y. 235; *Union Pacific RR. Co.* v. *Laramie Stockyards Co.*, 231 U. S. 190.'

We are of the opinion that the court erroneously allowed interest on the unliquidated damages and that the judgment must be modified by striking out the allowance of interest, and as modified, affirmed.

All concur."

Said Appellate Division modified the judgment of the Trial Court by striking out the allowance of interest and as so modified, affirmed the Trial Court.

The said defendants-appellants thereupon appealed to the Court of Appeals of the State of New York, which is the highest court of appellate jurisdiction in the State of New York, from so much of said order and

judgment of said Appellate Division as affirmed the judgment of the Trial Court and the plaintiff-respondent appealed to said Court of Appeals from so much of said order and judgment of the Appellate Division as modified the judgment of the Trial Court.

Said Court of Appeals modified the order and judgment of said Appellate Division by restoring the interest disallowed, and as so modified, affirmed the order and judgment of said Appellate Division, and ordered, and adjudged that the proceedings in said Court of Appeals be remitted to the Supreme Court of the State of New York there to be proceeded upon according to law.

That thereafter and on the 6th day of March, 1933, an order was made herein by Hon. John F. Carew, one of the justices of the Supreme Court of the State of New York sitting at Special Term, Part II, of the said Supreme Court held in and for the County of New York, which provided that:

> "The order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court."

The said Court of Appeals rendered a written opinion but the same has not as yet been officially reported. The said decision of the said Court of Appeals states in part:

> "The court below has held that so much of the statute as makes it compulsory to allow interest on unliquidated claims cannot apply to a claim for unliquidated damages on a contract entered into before April 4, 1927, as the obligation of

such contract would be thereby impaired. (cf. *Sweeney* v. *State*, 251 N. Y. 417, modifying 225 App. Div. 606.)

'No State shall * * * pass any * * * law impairing the obligation of contracts.' (U. S. Cons. Art. I, S. 10.) 'A contract is an agreement by which a party undertakes to do or not to do a particular thing.' (*Ogden* v. *Saunders*, 12 Wheaton 317.) By the obligation of a contract is meant the legal obligation of the parties to adhere to the agreement which at the time of contracting the law recognized and made enforceable. (*Ogden* v. *Saunders*, *supra*.) The question thus resolves itself into this: When the parties enter into a contract the breach of which results in a claim for unliquidated damages, do the parties make an agreement that no interest shall be charged on the principal sum found due which agreement would be impaired by a later statute which permits the recovery of interest? (*Coombs* v. *Getz*, 285 U. S. 434.)"

* * * * "The amendment to C. P. A., S. 480, changes a rule of the common law but it conflicts with no constitutional guarantee. It prevents an escape through procedural difficulties from the real obligation to make full compensation for breach of contract. A claim for damages represents a pecuniary loss which should include interest. The obligation of the contract includes interest. The rule of law was that if the defendant could not determine on any fixed day what was due, no interest could be recoverable because defendant knew not what, if anything, he should pay. That was a rule of convenience, not an agreement to forego interest. The implied obligation of the contract was to

pay interest in accordance witih the rules of law existing when the case was tried."

* * * "The judgment should have included the interest allowed by the trial court. Otherwise the decision below seems supported by the evidence and free from legal error."

Upon said defendants-appellants' appeal to the said Court of Appeals and in opposition to the cross appeal of the plaintiff-respondent, it was urged that said Section 480 of the New York Civil Practice Act as amended April 4, 1927, was repugnant to the United States Constitution, Article I, Section 10, and the Fourteenth Amendment thereof, upon the ground that if interest was allowed upon the damages assessed that the defendants-appellants' rights and obligations in and to the contract upon which the plaintiff-respondent's cause of action was based were impaired and that they were deprived of property without due process of law.

That thereafter said defendants-appellants made a motion for a reargument of the appeals to said Court of Appeals herein but the same was denied without opinion.

That the time within which an application may be made for leave to appeal to the Supreme Court of the United States commences to run in the present case from the date that the judgment was entered in the office of the clerk of the County of New York pursuant to the remittitur of the clerk of the said Court of Appeals, to wit, on the 6th day of March, 1933. (See *Chicago Great Western Ry.* v. *Basham*, 249 U. S. 164;

Citizens Bank v. *Opperman*, 249 U. S. 448; *Morse* v. *United States*, 270 U. S. 151; *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 400.)

The right of the United States Supreme Court to review the judgment of the Court of Appeals of the State of New York, as entered in the above entitled matter, is established in the following cases: *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 50 Sup. Ct. 338: *Millsaps College* v. *City of Jackson*, 275 U. S. 129, 48 Sup. Ct. 94; *McCullough* v. *Virginia*, 172 U. S. 102, 19 Sup. Ct. 134; *Houston, etc., Ry. Co.* v. *Texas*, 177 U. S. 66, 20 Sup. Ct. 545; *Terre Haute, etc., Ry. Co.* v. *Indiana*, 194 U. S. 579, 24 Sup. Ct. 767; *New York Electric Lines Co.* v. *Empire City Subway Company*, 235 U. S. 179, 35 Sup. Ct. 72; *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 34 Sup. Ct. 767; *Piqua Branch of Ohio State Bank* v. *Knoop* (Ohio, 1853), 16 How. 369, 14 L. Ed. 977; *Jefferson Branch Bank* v. *Skelly* (Ohio, 1862), 1 Black 436, 17 L. Ed. 173; *Passaic River, etc., Bridge* v. *Hoboken Land, etc., Co.* (N. J. 1864), 1 Wall. 116, 17 L. Ed. 571.

WHEREFORE your petitioners pray for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of New York, and that the judgment of the Supreme Court of the State of New York in and for the County of New York entered pursuant to the mandate of the Court of Appeals of New York in the Office of the Clerk of the County of New York on November 7, 1932, be modified to the extent of the interest allowed upon said judg-

ment in the sum of $14,417.57, to the end that the record in said matter may be removed into the Supreme Court of the United States and the errors complained of by your petitioners may be examined and corrected and said judgment modified as aforesaid, and for an order fixing the amount of the bond thereon, and so your petitioners will ever pray.

Dated, New York, March 25, 1933.

RAYMOND J. FUNKHOUSER,
ELMER N. FUNKHOUSER,
Defendants-Appellants-Respondents,
By GEORGE LINK, JR., and
McKERCHER & LINK,
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(3390)